

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	
)	
HALO PROPERTIES, LLC)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
RESPONDENT)	CASE NUMBER WPC07-0276

DIRECTOR’S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed director of the Division of Water Pollution Control by the commissioner of the Tennessee Department of Environment and Conservation (hereinafter the “division” and the “department” respectively).

II.

HALO Properties, LLC, (hereinafter Respondent HALO) is an active corporation licensed to conduct business in the state of Tennessee and is the owner/developer of Berry Hill Subdivision, a residential subdivision in Sumner County (hereinafter the “site”). Service of process may be made on Respondent HALO through A. Danny Hale, Registered Agent, at 761 Plantation Boulevard, Gallatin, Tennessee 37066.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a “person” as defined by T.C.A. § 69-3-103(20) and as herein described, has violated the Act.

V.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (hereinafter the “TNCGP”) may be obtained by submittal of a Notice of Intent (NOI), a site specific Storm Water Pollution Prevention Plan (SWPPP), and appropriate fee.

VI.

Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

VII.

The unnamed tributary to Drakes Creek, and the cove of unnamed tributary Drakes Creek, described herein, are “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife.

FACTS

VIII.

On September 28, 2005, a NOI, SWPPP, and appropriate fee were submitted to the Nashville Environmental Field Office (NEFO) by Respondent HALO, requesting coverage under the TNCGP for construction activities at the site. No additional operators were identified on the NOI. The division issued coverage under the TNCGP on November 7, 2005.

IX.

On November 5, 2005, applications requesting written ARAP authorization for the construction of a minor road crossing and a utility line crossing at the site were submitted to the NEFO by Respondent HALO. The division issued written authorization for these activities on December 15, 2005.

X.

On May 7, 2007, the division received a complaint regarding sediment loss from the site onto several adjacent properties. This complaint was referred to the City of Hendersonville's storm water management division for appropriate action.

XI.

On November 16, 2007, division personnel conducted a complaint investigation at the site and noted that large areas of the site consisted of steep slopes and that these slopes were unstable. Ineffective Erosion Prevention and Sediment Control (EPSC) measures had allowed eroded material to migrate off site and onto adjacent properties, as well as into an unnamed tributary to Drakes Creek. Sediment deposits several inches deep were noted in the unnamed tributary beginning at the site outfall and continuing into the cove of the unnamed tributary at the confluence with Drakes Creek, resulting in a condition of pollution. Division personnel noted that the unnamed tributary itself had been graded and grass sown in the channel for approximately 200 feet upstream of the site outfall and that a rock check dam had been installed in the unnamed tributary upstream of the outfall. The NOC and SWPPP were not available on site as required by the TNCGP. A subsequent file review determined that the Model Home and

Construction Office had been constructed on Lots Number 9 and 10, where a sediment trap and riser pipe were to have been installed, in accordance with the SWPPP.

XII.

On November 27, 2007, the division issued a Notice of Violation (NOV) to the Respondent for the violations noted during the November 16, 2007, complaint investigation. The Respondent was instructed to immediately install and maintain effective EPSC measures, retrofit the existing sediment basin to retain sediment on site and construct an additional sediment basin of sufficient capacity to treat the remaining volume of water not treated by the existing basin. The Respondent was instructed to submit, within 15 days of receipt, a SWPPP updated to conform to Part 3 of the TNCGP. Additionally, the Respondent was instructed to submit, within 30 days of receipt, a Corrective Action Plan (CAP) for the removal of accumulated sediment from the unnamed tributary to Drakes Creek and the cove of the unnamed tributary to Drakes Creek. The CAP was to include detailed actions proposed to remove the rock check dam, restore the altered portion of unnamed tributary to its original condition, and to provide a native vegetative buffer along the tributary.

XIII.

On January 14, 2008, the division received a response to the November 27, 2007, NOV in which the Respondent indicated willingness to comply with the terms and conditions of the TNCGP. However, the updated SWPPP required by the NOV was not submitted.

XIV.

During the course of investigation, the division incurred DAMAGES in the amount of ONE HUNDRED NINETY FOUR DOLLARS AND EIGHT CENTS (\$194.08).

VIOLATIONS

XV.

By failing to comply with the terms and conditions of the TNCGP and by altering waters of the state without authorization under an ARAP, the Respondent has violated T.C.A. §§ 69-3-108(b) and 114(b), which state in part:

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a

permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XVI.

By causing a condition of pollution in the unnamed tributary to Drakes Creek and the cove of the unnamed tributary to Drakes Creek, the Respondent has violated T.C.A. Section 69-3-114(a), which states:

§ 69-3-114(a):

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in § 69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XVII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER AND ASSESSMENT to the Respondent.

1. The Respondent shall, within 7 days of receipt of this ORDER, establish effective EPSC measures on-site such that sediment is not allowed to leave the site or enter waters of the state.

2. The Respondent shall maintain EPSC measures until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established.
3. The Respondent shall, within 7 days of establishing effective EPSC measures, submit written documentation and photographic evidence indicating that these measures are in place. The Respondent shall submit this written documentation and photographic evidence to the Water Pollution Control Manager in the NEFO at 711 R.S. Gass Boulevard, Nashville Tennessee 37243, and a copy of the written documentation and photographic evidence to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.
4. The Respondent shall, within 14 days of receipt of this ORDER, submit an updated SWPPP and site map to the NEFO. The SWPPP shall conform to the requirements of Part 3 of the TNCGP and shall clearly indicate the measures proposed to treat the storm water run off that would have been treated by the sediment trap and riser pipe on Lots 9 and 10. The site map shall clearly indicate the boundaries of the site and the area of planned disturbance.
5. The Respondent shall, within 30 days of receipt of this ORDER, submit a CAP to the division for the removal of the accumulated sediment from the unnamed tributary to Drakes Creek, the cove of the unnamed tributary and the restoration of the altered portion of the unnamed tributary. The CAP shall be prepared by a professional engineer licensed in the state of Tennessee, a landscape architect licensed in the state of Tennessee or other competent professional, and shall detail the manual methods proposed to remove the

accumulated sediment from the unnamed tributary and the proposed method for dredging of the accumulated sediment from the cove of the unnamed tributary. The CAP shall also contain a component detailing the proposed actions to be taken to restore the affected portion of the unnamed tributary to its original condition. The Respondent shall submit the CAP to the NEFO for review and approval and shall submit a copy of the CAP to the E&C Section, at the respective addresses shown above in item 3. The Respondent must correct any deficiencies the division finds upon review of the CAP and the corrected CAP should be resubmitted to the division within 30 days of notification of the deficiencies

6. The Respondent shall, within 30 days of receipt of written approval of the CAP, initiate the approved actions. The written approval of the CAP by the division will constitute authorization for sediment removal from the affected areas downstream of the site and restoration of the unnamed tributary and no additional ARAP coverage is required. The Respondent shall submit written notification to the division that work has begun at the time approved actions are initiated. The Respondent shall submit the written notification to the NEFO and shall submit a copy of the written notification to the E&C Section, at the respective addresses shown above in item 3
7. The Respondent shall, within 180 days of initiating the approved actions, but not later than September 29, 2008, complete the CAP and submit written notification of completion to the division. The Respondent shall submit the written notification to the NEFO and shall submit a copy of the written notification to the E&C Section, at the respective addresses shown in above in item 3.

8. The Respondent shall, within six months of receipt of this ORDER, provide documentation of attendance and successful completion of the department's Erosion Prevention and Sediment Control Workshop, for all employees who manage or oversee construction projects to the NEFO and a copy to the E&C Section at the respective addresses shown above in item 3. Information may be found on the program website at <http://www.tnepsc.org/>.
9. The Respondent shall pay DAMAGES to the division in the amount of ONE HUNDRED NINETY FOUR DOLLARS AND EIGHT CENTS (\$194.08) within 30 days of receipt of this ORDER.
10. The Respondent shall pay a CIVIL PENALTY of TWENTY SIX THOUSAND DOLLARS (\$26,000.00) to the division, hereby ASSESSED to be paid as follows:
 - a. The Respondent shall, within 30 days of receipt of this ORDER, pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00).
 - b. If the Respondent fails to comply with Part XVII, item 1 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of THREE THOUSAND DOLLARS (\$3,000.00), payable within 30 days of default.
 - c. If the Respondent fails to comply with Part XVII, item 2 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of THREE THOUSAND DOLLARS (\$3,000.00), payable within 30 days of default.
 - d. If the Respondent fails to comply with Part XVII, item 3 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of TWO THOUSAND DOLLARS (\$2,000.00), payable within 30 days of default.

- e. If the Respondent fails to comply with Part XVII, item 4 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of TWO THOUSAND DOLLARS (\$2,000.00), payable within 30 days of default.
- f. If the Respondent fails to comply with Part XVII, item 5 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.
- g. If the Respondent fails to comply with Part XVII, item 6 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of THREE THOUSAND DOLLARS (\$3,000.00), payable within 30 days of default.
- h. If the Respondent fails to comply with Part XVII, item 7 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.
- i. If the Respondent fails to comply with Part XVII, item 8 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of ONE THOUSAND DOLLARS (\$1,000.00), payable within 30 days of default.

The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the

Respondent fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondent is advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 28th day of January 2008.



Paul E. Davis, P.E.
Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.